Maryland Law Review

Volume 40 | Issue 1 Article 6

Recent Decision

Recent Decision

ENFORCING PLEA BARGAINS: A STEP BEYOND CONTRACT LAW

Cooper v. United States

In *Cooper v. United States*,[1] the Fourth Circuit expanded the rights of defendants who take part in plea bargaining[2] by recognizing that expectations reasonably formed by defendants as a result of negotiations with the government deserve constitutional protection even though those negotiations are not embodied in the form of an enforceable contract.[3]

FACTS

Cooper, a Drug Enforcement Administration informer, was indicted in the District of Maryland on charges of witness bribery and obstruction of justice.[4] At approximately 11:00 a.m. on May 11, 1977, Cooper's defense counsel and an Assistant United States Attorney entered plea negotiations in which the government attorney offered to dismiss all but one count of the indictment and to bring Cooper's cooperation with the government to the sentencing judge's attention. In return, Cooper was to plead guilty to the one remaining count and continue to cooperate with federal authorities. The government attorney made known that the plea proposal would be held open for acceptance for one week,[5] giving no indication that his plea proposal was subject to the approval of his superior.[6] Defense counsel immediately visited Cooper in the local jail where he was incarcerated and obtained his agreement to the proposal.

At noon the same day, defense counsel began a series of unsuccessful attempts to contact the government attorney and inform him of Cooper's acceptance. At 1:30 p.m., the Assistant United States Attorney was instructed by his superior, the United States Attorney for the District of Maryland, to withdraw the plea proposal. When defense counsel finally contacted the government attorney, he was informed of the withdrawal before he could voice Cooper's acceptance.[7] Defense counsel unsuccessfully protested to the assistant government attorney and his superior that the agreement was complete and its withdrawal improper.[8] A pre-trial hearing on defendant's motion to compel

1. 594 F.2d 12 (4th Cir. 1979).

2. The Supreme Court has defined plea bargaining as, "the disposition of criminal charges by agreement between the prosecutor and the accused. . . ." Santobello v. New York, 404 U.S. 257, 260 (1971).

3. 594 F.2d at 18.

4. *Id.* at 13.

5. *Id.* at 15 n.2.

6. *Id.* at 19.

7. Brief for Appellant, app. at 9, Cooper v. United States, 594 F.2d 12 (4th Cir. 1979).

8. In addition to claiming the agreement was complete, Cooper's counsel "indicated that [withdrawal of the plea offer] placed [him] in a precarious position with regard to his client." *Id.* at 5.

enforcement of the proposal also proved futile. The trial court, relying on traditional contract law, concluded that the plea agreement was not enforceable because the offeror had exercised his right to revoke the offer without reason prior to the offeree's communication of acceptance.[9] It also concluded that the withdrawal of the offer was not barred by the doctrine of promissory estoppel[10] because Cooper had not relied on the offer to his detriment.[11] After he was convicted and sentenced, Cooper appealed on several grounds. The Fourth Circuit found no merit in his claim of prejudicial error during the trial,[12] but vacated the judgment upon finding constitutional error in the district court's refusal to enforce the government's plea proposal.[13]

THE OPINION OF THE FOURTH CIRCUIT

The Fourth Circuit began its analysis in *Cooper* by noting that although the Supreme Court accepted plea bargaining and recognized a constitutional right to fairness in the bargaining process,[14] the Court had left undefined the scope of this constitutional right. Pointing out that courts often apply the standards of substantive and remedial contract law when reviewing plea bargaining practices and affording relief to defendants unfairly treated in the process,[15] the court in *Cooper* questioned the extent to which contract law may be drawn upon to define the limits of the defendants' constitutional rights.[16] Since the government had withdrawn its plea proposal before Cooper accepted it, the court concluded that under classic contract law Cooper had no right to enforcement of the proposal.[17] In addition, promissory estoppel[18] did not apply because the defendant could show no tangible detrimental reliance.[19] He had simply "form[ed] the subjective intent to accept the offer and experience[d] whatever expectations of benefit had been created by anticipation of its fulfillment."[20]

Affirming the utility of contract law analogies in plea bargaining disputes, the court nevertheless concluded that Cooper's expectations merited constitutional protection; the failure of a particular plea negotiation to satisfy the standards of contract law should not preclude the defendant from claiming the

---

9. 594 F.2d at 16 n.5.

10. *Id.* When an offeree, acting on a reasonable belief arising from an offeror's words or actions that an offer will not be revoked, relies to his detriment, the offeror may be barred from revoking the offer. *See generally* 1 A. CORBIN, CONTRACTS §§ 49–52 (1963).

11. Generally, a defendant has relied on a plea bargain to his detriment when he has incriminated himself in some way; *i.e.*, he has revealed damaging evidence or confessed.

12. Cooper claimed that the trial court improperly admitted into evidence a recording of a telephone conversation in which he took part, and abused its discretion in failing to sequester a witness during the testimony of other witnesses. 594 F.2d at 14.

13. *Id.* at 13.

14. *Id.* at 15 (citing Santobello v. New York, 404 U.S. 257 (1971)).

15. 594 F.2d at 15–16. *See* note 9 and accompanying text *supra*.

16. 594 F.2d at 16.

17. *Id.*

18. *See* note 10 *supra*.

19. *See* note 11 *supra*.

20. 594 F.2d at 16.

negotiation was constitutionally unfair.[21] Simply put, the court held that a plea bargain need not be contractually enforceable to be constitutionally enforceable. It reasoned that contract law could not adequately define the limits of constitutional rights because the goals of contract law and constitutional law are dramatically different. Fairness under contract law merely requires minimally equitable dealings at arm's length in the market place, as defined by technical rules of economic and utilitarian origin.[22] Fairness in the constitutional sense, as defined by due process, is designed to protect the individual citizen from the unjust acts of a powerful and unwieldy government.[23] Therefore, constitutional fairness is of necessity broader in scope and less technically defined than contractual fairness.[24] Based on this reasoning, the court concluded that "expectations reasonably formed [by the defendant] in reliance upon the honor of the government in making and abiding by its proposals"[25] deserved constitutional protection even though those expectations did not amount to contractual reliance.[26]

The Fourth Circuit employed a circular three-step analysis in recognizing that Cooper had a constitutional right to protection of his expectations. First, the court identified the general sources of the constitutional right it recognized. Second, it examined the facts in *Cooper* in light of these general constitutional sources. Third, it subjected the right it recognized under those facts to a test of constitutional reasonableness.[27]

According to the court, the constitutional principles on which Cooper's right was based were the fifth amendment right to due process and the sixth

---

21. *Id.* at 18.

22. The court stated that:

> In quite general terms, analogies from contract law will usually provide a reliable inclusive test for the existence of constitutional right and violation, but not an equally reliable exclusive test. Conduct by government prosecutors that in the market place would constitute breach of contract or give rise to promissory estoppel will practically always reflect constitutionally unfair conduct in transactions between sovereign and citizen in matters of liberty and punishment. But the obverse of this does not follow. Just because the elements of express contract or promissory estoppel have not been realized in particular plea negotiations cannot mean conclusively that there has been no unfairness in the constitutional sense.

Id. at 17.

23. *See, e.g.*, United States *ex rel.* Selikoff v. Comm'r of Correction, 524 F.2d 650, 654 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976) ("[Contract] principles, borrowed from the commercial world, are inapposite to the ends of criminal justice."); United States v. Hughes, 223 F. Supp. 477, 480 (S.D.N.Y. 1963), *aff'd*, 325 F.2d 789 (2d Cir. 1964) ("[T]he Court will not be governed by the technical concept of 'promise' as used in contract law."); State v. Brockman, 277 Md. 687, 697, 357 A.2d 376, 383 (1976) ("[R]igid application of contract law to plea negotiations would be incongruous."); People v. Reagan, 395 Mich. 306, 314, 235 N.W.2d 581, 585 (1975) ("The standards of commerce do not govern, and should not govern, the administration of criminal justice.").

24. Brewer v. Williams, 430 U.S. 387, 401 n.8 (1977).

25. 594 F.2d at 18.

26. *Id.*

27. *Id.*

amendment right to effective assistance of counsel.[28] Concluding that the defendant's fifth amendment right was "too plain to require discussion,"[29] the court concentrated on explaining the application of the sixth amendment. It reasoned that the prosecutor is required to negotiate plea bargains with defense counsel who must then report the results, including unfavorable ones, to the defendant. Improper government retractions communicated through defense counsel may not only erode the defendant's confidence in the honor of the government, but in defense counsel's ability and performance as well. As a result, defense counsel's effective assistance could be diminished.[30] Applying this reasoning to the facts in *Cooper,* the court held that "once presented, . . . a [reasonable] proposal may not be withdrawn in the face of proffered acceptance for no other reason than that a superior disagrees with an apparently authorized subordinate's judgment in making it."[31] Finally, the court subjected its conclusion to a test of constitutional reasonableness by weighing the practical burdens that recognition of the right would place on the government against the practical consequences that its nonrecognition would have for the defendant.[32] Reasoning that simple precautions by the government could protect the defendant from abuse and instill public confidence in government administration of justice, the court found that the right recognized was constitutionally reasonable.[33]

In conclusion, the court held that the appropriate remedy for the breach of Cooper's constitutional right was specific enforcement of the government's proposal to the fullest extent possible.[34] The judgment was vacated and remanded with instructions that the defendant be allowed to enter a plea of guilty to one of the counts upon which he was convicted. If he did so, all remaining counts would be dismissed, as the government had originally proposed. If he failed to plead guilty to one count, his conviction on all four counts would be reinstated. In addition, the defendant was relieved of any other obligations he may have had under the original proposal. However, the government was also relieved of any reciprocal obligations to recommend a specific sentence.[35]

---

28. *Id.* The court did not attempt to provide a general rule to be applied in similar cases, but left the determination of when the right at issue arose to case-by-case development.

29. *Id.* Specifically, the court referred to the right of "fundamental fairness" encompassed in the substantive due process clause of the fifth amendment. *See* Powell v. Alabama, 287 U.S. 45, 67 (1932).

30. 594 F.2d at 18–19.

31. *Id.* at 19.

32. *Id.*

33. *Id.* at 19–20.

34. The Fourth Circuit noted that the fact that the district court could have objectively considered and rejected the plea proposal did not prohibit it from directing the district court to enforce the proposal on remand. *Id.* at 20.

35. *Id.* at 20–21.

JUDICIAL PROTECTION AGAINST BROKEN PLEA BARGAINS[36]

Santobello v. New York

In the only Supreme Court case dealing squarely with the issue of broken plea bargains, *Santobello v. New York*,[37] the Court recognized that plea bargaining is an important aspect of the criminal justice system, and expressed concern that the interest of the accused in the fair disposition of his case be carefully protected.[38] To safeguard that interest, the Court required that promises or agreements made by a prosecutor which are part of the inducement or consideration for a plea bargain be fulfilled.[39]

In *Santobello*, the accused negotiated with the prosecutor, reaching the agreement that the accused would withdraw his previous not guilty plea and plead guilty to a lesser included offense in exchange for the prosecutor's promise to make no recommendations as to sentence. When the accused appeared for sentencing several months later, a new prosecutor who was unaware of his predecessor's promise recommended the maximum sentence, which the judge imposed. On appeal, the Court concluded that "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty" required that the judgment be vacated and the case remanded to the state court for further consideration as to whether the circumstances required only that the promise be specifically enforced or that the accused be allowed to withdraw his plea.[40]

---

36. For an extensive coverage of the historial, social, philosophical and legal aspects of the plea bargaining process, see 13 LAW & SOC'Y REV. 197 (1979) (special issue devoted entirely to plea bargaining). For a history of guilty pleas from tribal society to the present, see Wishingood, *The Plea Bargain in Historical Perspective*, 23 BUFFALO L. REV. 499 (1974).

37. 404 U.S. 257 (1971). In Brady v. United States, 397 U.S. 742 (1970), the Supreme Court first stated that plea bargaining was a constitutionally proper practice. *Id.* at 753. However, the Court noted that pleading guilty is a "grave and solemn act" which results in a waiver of several constitutional rights; *i.e.*, the right to a jury trial, the right to confront one's accusers, and the right not to incriminate oneself. *Id.* at 748. Therefore, in order to be constitutionally valid the plea must be entered *voluntarily* and *intelligently*. *Id.* at 755–56. Although the Court in *Santobello* mentioned the *Brady* requirements that a plea be "voluntary and knowing," 404 U.S. at 261, it based the defendant's right to relief primarily on the "interests of justice." *Id.* at 262. Had the *Santobello* Court concluded that the constitutional violation was that the plea was not "voluntary and knowing," it seems the appropriate remedy would have been recission of the guilty plea, as it is unlikely a defendant would wish to enforce an involuntary or unintelligent plea. In fact, defendant Santobello specifically requested that he be granted a recission. The Court rejected this request, concluding that the state court should decide whether the circumstances of the case "require" specific performance by the government or "require" recission. *Id.* at 263. Taking the implications of the Court's logic one step further, it seems that the primary situation in which specific performance would be required to satisfy constitutional standards would be when the defendant's expectations that the promise would be fulfilled merit constitutional protection.

38. 404 U.S. 257, 260–61 (1971).

39. *Id.* at 262.

40. *Id.* at 262–63. *See* note 35 *supra*.

Each of the seven Supreme Court justices who heard Santobello's arguments concluded that he had a right to some remedy for the broken plea bargain.[41] The majority based its opinion on the well-settled principle that a guilty plea must be voluntary and intelligent[42] and on the general "interests of justice."[43] Although there was no specific statement that the opinion was constitutionally grounded, the Court in *Santobello* was reviewing a state court decision to which no federal statute applied. Therefore, unless its decision was based on federal constitutional grounds, the Court would not have had jurisdiction to reverse the state court below.[44] Indeed, in his concurring opinion, Justice Douglas clearly indicated that a "constitutional rule," apparently stemming from due process, was applicable to the case.[45]

However, the majority's failure to elaborate on the meaning of the "interests of justice," as well as to identify and explain the constitutional basis for its decision, has left the lower courts with little guidance when faced with a broken plea bargain. If the particular facts involve an accepted offer which has been relied upon by the defendant, as in *Santobello*, then the lower court need look no further than the "interests of justice" to enforce the plea bargain. But when the facts deviate from those in *Santobello*, as they do in *Cooper*, the court is faced with the basic issue left unresolved by the Supreme Court: are the "interests of justice," and the constitutional rights they imply, limited by the general principles of contract law?[46]

The Use of Contract Analogies in Defining Plea Bargaining Rights

Some courts hold that a defendant's constitutional rights in the plea bargaining process are coextensive with, and therefore defined by, analogous contract rights.[47] These courts do not recognize the agreement between the

---

41. Chief Justice Burger authored the majority opinion reversing the defendant's conviction, and was joined by Justices Douglas, White, and Blackmun. Justice Douglas also wrote a concurring opinion. Justice Marshall agreed with the decision to reverse, but dissented from the decision to allow the state court to choose the proper remedy on remand. Justices Brennan and Stewart joined the Marshall opinion.

42. Brady v. United States, 397 U.S. 742, 755–56 (1970). *See* note 37 *supra*.

43. 404 U.S. at 262. The Court also stated that the plea bargaining process must be "attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* Perhaps the Court was implying that its decision was based on due process.

44. *See* 28 U.S.C. § 1257 (1976).

45. 404 U.S. at 267 (Douglas, J., concurring). *Accord*, Cooper v. United States, 594 F.2d 12 (1979). *Contra*, State v. Kuchenreuther, 218 N.W.2d 621, 624 (Iowa 1974) ("It is also worthy of note that *Santobello* was not adjudicated on any constitutional ground but rather by application of what may be termed a 'fair play standard.' ").

46. *See* note 50 and accompanying text *infra*. For an extensive discussion of the Supreme Court's opinion in *Santobello*, see Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471 (1978).

47. *See, e.g.*, Johnson v. Beto, 466 F.2d 478, 480 (5th Cir. 1972); Shields v. State, 374 A.2d 816, 820 (Del.), *cert. denied*, 434 U.S. 893 (1977).

defendant and the state as a bona fide contract governed by federal contract law, but simply refer to the general principles of commercial contract law for guidance. Courts which apply contract law analogies to plea bargaining generally conclude that a defendant has no right to require enforcement of the prosecutor's promise unless he has clearly accepted the offer, acted in reliance upon the government's promise,[48] and suffered measurable injury as a result of its withdrawal.[49] Even the Supreme Court has suggested that contract law furnishes a ready framework in which to define the rights of the parties when a plea bargain is broken by a prosecutor.[50]

When using a contract analogy, most courts view the plea agreement as a form of unilateral contract.[51] Therefore, the consideration the defendant gives for the prosecutor's promise is not his promise to plead guilty, but the act of pleading guilty itself. Although the prosecutor is under no obligation to perform until the defendant performs, he has no right to compel the defendant's

---

48. *See* note 11 *supra*.

49. The following courts have scrutinized plea agreements under traditional contract doctrines: Anderson v. Wainwright, 446 F. Supp. 763, 765 (M.D. Fla. 1978); State v. Rogel, 116 Ariz. 114, 116, 568 P.2d 421, 423 (1977) (en banc); Shepard v. State, 549 S.W.2d 550, 551 (Mo. App. 1977); State v. Collins, 300 N.C. 142, 265 S.E.2d 172 (1980). Courts have also allowed prosecutors to withdraw from plea agreements where the defendant had not yet relied on the promise to his detriment. State v. Reasbeck, 359 So.2d 564, 565 (Fla. Dist. Ct. App. 1978); State v. Edwards, 279 N.W.2d 9 (Iowa 1979) (expressly rejecting the *Cooper* decision); DeRusse v. State, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979) ("In the absence of any showing of harm, we hold that the prosecutor's withdrawal from the plea bargain agreement prior to the entry of a plea by appellant was not reversible error.").

In *Cooper*, defense counsel and the government framed the arguments in their briefs in contractual terms. Defense counsel argued that "The [trial] Court failed to go beyond the 'black letter' law of plea bargaining, and should have delved more deeply into the law of contracts . . . ." Brief for Appellant at 15, Cooper v. United States, 594 F.2d 12 (4th Cir. 1979). The government relied on the theory that the plea agreement was not enforceable because the offer had been withdrawn before it was accepted or acted upon by Cooper. Brief for Appellee at 18–19, Cooper v. United States, 594 F.2d 12 (4th Cir. 1979).

50. Bordenkircher v. Hayes, 434 U.S. 357 (1978); Blackledge v. Allison, 431 U.S. 63, 75 n.6 (1977). However, the Court has not stated that contract law limits the rights of a defendant. The question remains open because the Court has not been presented with a situation in which a prosecutor broke a plea bargain which did not constitute a traditional contract.

Note, however, that *Santobello* could have been decided on the basis that the contract was breached, but the Court did not rely extensively on that analysis. Yet, several lower courts have interpreted *Santobello* as relying on a contract analysis. *See* United States v. Bridgeman, 523 F.2d 1099, 1109–10 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976) ("*Santobello* . . . involved fundamental principles of contract law."); State v. Collins, 300 N.C. 142, 265 S.E.2d 172 (1980) (interpreted *Santobello* narrowly to allow enforcement of a plea bargain when it took the form of a contract). *See also* Turner v. Fair, 476 F. Supp. 874, 879 (D. Mass. 1979) ("[The witness seeking immunity] may be able to enforce specific performance of the Commonwealth's promise . . . either according to a contract theory [citing *Santobello*] or according to fundamental notions of fairness embodied in the Due Process clause of the Fourteenth Amendment [citing *Cooper*] . . . .").

51. *See generally* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 4-15 (2d ed., 1977).

performance. As a result, the prosecutor does not breach a contract if he rescinds his offer before the defendant performs because the contract does not exist until the defendant takes the promised action.[52]

Other courts have completely rejected the application of contract analogies to broken plea bargains. These courts have reasoned that the economic and utilitarian standards used to evaluate arm's-length transactions in the business world are not appropriate measures of the constitutional rights of a defendant who is unable to deal at arm's length with the criminal justice system.[53]

Although contract law will not protect expectations arising as a result of an agreement between equal private parties unless the agreement has met technical requirements, the agreement between a prosecutor and a defendant is essentially different. The plea bargain is an agreement between the government and a private individual which has the ultimate goal of advancing criminal justice.[54] In contrast, the civilly enforced contract has as its goal fairness in the market place as measured in economic and utilitarian terms.[55] If contract law had as its goal promoting justice instead of commercial utility, the *Cooper* court would probably have decided differently and held that constitutional rights were only as broad as contract rights.

---

52. *See* Shields v. State, 374 A.2d 816, (Del.), *cert. denied*, 434 U.S. 893 (1977); State v. Edwards, 279 N.W.2d 9 (Iowa 1979); State v. Brockman, 277 Md. 687, 357 A.2d 376 (1976); State v. Collins, 300 N.C. 142, 265 S.E.2d 172 (1980).

Note that under the common law of contracts, an offeror can withdraw his offer if he received no consideration for it, absent a claim of promissory estoppel. *See generally* 1 A. CORBIN, CONTRACTS §§ 38-51 (1963). However, the harshness of this doctrine is gradually being softened. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89B(2) (Tent. Draft Nos. 1-7, 1973) which states:

> An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

Note also § 2-205 of the Uniform Commercial Code, which states that a merchant who extends an offer and gives assurance that it will be held open for a stated (or reasonable) time may not withdraw that offer for lack of consideration. Recall that the prosecutor in *Cooper* represented in making the plea proposal that it would be held open for acceptance for a week. Cooper v. United States, 594 F.2d 12, 15 n.2 (4th Cir. 1979). Surely a criminal defendant considering an offer to plea bargain which will affect his liberty and his future deserves the same advantages enjoyed by a businessman contemplating an offer to purchase goods.

53. *See* note 23 *supra*. In State v. Ashby, 81 N.J. Super. 350, 195 A.2d 635 (1963), *rev'd on other grounds*, 43 N.J. 273, 204 A.2d 1 (1964), a dissenting judge argued that:

> A pledge of public faith, and not the law of contracts, is the motivating factor in the enforcement of these promises . . . — the practice of enforcing promises of immunity stems from the common law recognition that one who gave evidence for the Crown was possessed of an equitable title to a recommendation for mercy. Clearly, the practice of enforcing such agreements could not, and did not in its inception, develop from a contractual relationship between the Crown and the Crown witness.

81 N.J. Super. at 370, 195 A.2d at 643 (Goldman, J., dissenting).

54. Santobello v. New York, 404 U.S. 257, 260 (1971).

55. *See* notes 22 & 51 *supra*.

Prior to *Cooper,* plea bargaining cases considered by the Fourth Circuit involved situations in which the plea agreement was valid in contractual terms.[56] Therefore, the prosecutor breached an agreement which was enforceable under contract law and there was no need to find grounds defined purely in constitutional terms for providing relief to the defendant.[57] When faced with the plea bargain in *Cooper* — a bargain which was not enforceable as a contract — the Fourth Circuit accepted the use of contract analogies in plea bargaining disputes but warned that "the temptation to take the relative certainties of established common law analogies too far in developing difficult constitutional doctrine is ever present and ever to be resisted."[58] The court concluded that the fact that a particular plea bargain did not satisfy the mechanical application of

---

56. *See* United States v. Hammerman, 528 F.2d 326 (4th Cir. 1975); Harris v. Superintendent, Virginia State Penitentiary, 518 F.2d 1173 (4th Cir. 1975) (the prosecutor's failure to present the court with a recommendation as to sentence was held a breach even though the court could not be bound by the recommendation); United States v. Brown, 500 F.2d 375, 378 (4th Cir. 1974) (a prosecutor's halfhearted recommendation to the court was held not sufficient to fulfill his promise to make a recommendation for the defendant's benefit); United States v. Carter, 454 F.2d 426, 427-28 (4th Cir. 1972), *cert. denied,* 417 U.S. 933 (1974) (a defendant's detrimental reliance upon a plea bargain and the prosecutor's subsequent breach were grounds for the dismissal of an indictment).

57. Thus, until it decided *Cooper,* the Fourth Circuit was in the same position as the Supreme Court; *i.e.,* it had not stated that the defendant's rights were limited by the principles of contract law but the need to venture beyond a contractual analysis had not arisen. *See* note 50 *supra.*

58. 594 F.2d at 17. The court found support for its statements in Brewer v. Williams, 430 U.S. 387, 401 n.8 (1977) ("[W]e do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law.").

Few courts before *Cooper* accepted the use of contract analogies while also recognizing the limits of such reasoning. In State v. Brockman, 277 Md. 687, 357 A.2d 376 (1976), the court stated:

> The standard to be applied to plea negotiations is one of fair play and equity under the facts and circumstances of the case, which, although entailing certain contract concepts, is to be distinguished from what the State appears to advocate, the strict application of the common law principles of contracts.

Id. at 697, 357 A.2d at 382-83 (citing *Santobello).*

The *Brockman* court also stated in dicta that "a defendant may sometimes be entitled to enforcement of his plea bargain even though he has not yet entered the confession of guilt he promised to make." *Id.* at 695-96, 357 A.2d at 382. The facts in *Cooper* go one step beyond the *Brockman* hypothetical, since Cooper not only had not entered a guilty plea, but had not even had a chance to convey a promise that he would.

The Fourth Circuit further explained its reasoning in United States v. McIntosh, 612 F.2d 835 (4th Cir. 1979). Discussing its decision in *Cooper,* the court stated:

> Contrary to appellant's argument, *Cooper* does not shun fundamental contract and agency principles where the content and validity of the plea bargain is at issue . . . . With predictability and reliance as the foundation of plea bargaining itself, we must apply fundamental contract and agency principles to plea bargains as the best means to fair enforcement of the parties' agreed obligations. Where, such as in *Cooper,* some technical rule works directly to impair a defendant's personal acceptance of an offer and deny a substantial right such as effective assistance of counsel, we will distinguish the application of such rules to the facts before us.

Id. at 837.

the law of contracts did not mean there had been no constitutional violation.[59] Clearly, the *Cooper* court would acknowledge that courts using contract analogies to the benefit of defendant are consistent with its holding. It is only those cases which rely upon contract law to deny the defendant recovery which are inconsistent with *Cooper*, and then only to the extent that there exists a constitutional right of broader scope than the contractual one.[60]

The Interests of Justice In Reviewing Plea Bargains

Although *Santobello* could have been decided on contract principles alone,[61] the Supreme Court chose instead to consider the "interests of justice,"[62] an approach which implies the use of constitutional principles.

A line of cases beginning in 1899 with *Commonwealth v. Saint John*[63] analyzed agreements between prosecutors and defendants in terms of the interests of justice and the importance of public faith in the criminal justice system.[64] The tone of these cases indicated that the defendant should be provided relief when government officials act improperly, in order to punish those officials for injuring the integrity of the criminal justice system and for compromising the high standards to which the government is held by its citizens. Damage to the individual defendant's constitutional rights either was not discussed or was mentioned only in terms of damage to society as a whole.[65]

---

59. 594 F.2d at 18.

60. *See* United States *ex rel.* Selikoff v. Comm'r of Corrections, 524 F.2d 650 (2d Cir. 1975), in which the defendant asked that the principles of contract law, namely strict application of specific performance, be imposed on the plea bargain he entered. The court held that due process did not require the remedy of specific performance under the circumstances. It is unclear how *Cooper* would deal with a situation in which the defendant would receive greater protection under contract law than he would under constitutional law.

61. In *Santobello*, an offer had been made and accepted and the defendant had entered a guilty plea in reliance upon the resulting agreement. Therefore, an enforceable contract existed and the prosecutor's failure to perform resulted in a breach of that contract. 404 U.S. 257 (1971).

62. *Id.* at 262.

63. 173 Mass. 566, 54 N.E. 254 (1899).

64. *See, e.g.*, State v. Davis, 188 So.2d 24, 27 (Fla. Dist. Ct. App. 1966) ("This was a pledge of the public faith — a promise made by state officials — and one that should not be lightly disregarded."); Sturgis v. State, 25 Md. App. 628, 637, 336 A.2d 803, 807 (1975) (the failure of the prosecutor to keep his promises "rendered valueless the State's word, [and] he effectively eroded the accused's trust in the integrity of the State."); State v. Ward, 112 W. Va. 552, 554, 165 S.E. 803, 804-05 (1932) ("The courts treat such promises [made by prosecutors] as pledges of the public faith.").

65. *See, e.g., In re* Doe, 410 F. Supp. 1163, 1166 (E.D. Mich. 1976) ("Neither may the government insist that Doe demonstrate some prejudice before claiming a violation of his rights in the government's broken promise. No prejudice, apart from that suffered by the administration of justice, was apparent in *Santobello*."). *See also* Note, *Criminal Law — Binding Effect of Prosecutor's Agreement to Dismiss Prosecution*, 23 WAYNE L. REV. 1129, 1140 n.41 (1977). The Fourth Circuit in *Cooper* devoted a part of its opinion to a similar theory. 594 F.2d at 20. *But see* Government's Petition for Rehearing at § 2, United States

Therefore, on the surface, these cases do not provide a constitutional basis for relief when plea bargains are reneged.[66]

However, the "public faith" line of cases is not constitutionally irrelevant. The *Cooper* court used similar reasoning to conclude that "failure to find constitutional right and violation in this case would necessarily give judicial approval to a practice whose possibilities for easy abuse, or at least the appearance of abuse, are abundantly clear."[67] The above language of the court implies that the defendant has a constitutional right defined in negative terms — the right to be free of governmental negligence or abuse. A right of this nature, though it generally benefits the individual defendant, is actually tailored to benefit the general public by attacking a deficiency in the judicial system itself.[68] Therefore, the "public interest" does receive the benefit of constitutional protection as long as it is embodied in the rights of an individual defendant.

In light of the limited control of the defendant over his fate in the criminal justice system, the government has been held to high standards in exercising its considerable power.[69] The Seventh Circuit recently stated that "both to protect the plea bargaining defendant from overreaching by the prosecutor and to insure the integrity of the plea bargaining process, the 'most meticulous

---

v. Cooper, 594 F.2d 12 (4th Cir. 1979), where the government used the "public faith" analysis to argue that "the [trial] Court should not focus solely on the defendant's interests, but also on the substantial social interests that correction of a government mistake would protect." *Id.* The government was attempting to balance the benefit of allowing the government to remedy its errors against the benefit of encouraging defendants to enter plea negotiations.

66. The Bill of Rights protects the interests of individual persons by creating rights personal to them. Faretta v. California, 422 U.S. 806, 818–21 (1975).

67. 594 F.2d at 20. However, the court in *Cooper* was careful to note there was no evidence of intentional abuse by the government.

See also Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471, 521 (1978) ("[I]n the area of broken plea agreements, due process is concerned with more than redressing personal injuries to the defendant; it is also concerned with deterring acts of bad faith by the state.").

68. The exclusionary rule, which prevents the use by the government in a criminal prosecution of evidence obtained in violation of the Constitution, is a clear example of a constitutional remedy based in large part on "public interest." Mapp v. Ohio, 367 U.S. 643 (1961). Although the exclusionary rule protects individual defendants, a major reason for its development was to deter improper police conduct in the interest of society as a whole. Stone v. Powell, 428 U.S. 465 (1976). However, the exclusionary rule is a constitutional *remedy* which is applied only after some other constitutional right, such as the fourth amendment prohibition against unreasonable searches and seizures, has been violated. The Court in *Mapp* concluded that the purpose of the exclusionary rule was "to compel respect for the constitutional guarantee in the only effectively available way — by removing the incentive to disregard it." 367 U.S. at 656.

69. Although contract law provides several doctrines intended to mitigate the effects of unequal bargaining power between parties (*e.g.*, theories of unconscionability, contracts of adhesion, construction of ambiguous terms against one who drafted the contract), the stakes are economic in nature. Such doctrines are not sufficient to protect a defendant's interest in life and liberty.

standards of both promise and performance must be met by prosecutors engaging in plea bargaining.'"[70] *United States v. Brown*[71] illustrates the meticulous standards which must be met by plea bargaining prosecutors in the Fourth Circuit. In *Brown*, a prosecutor unenthusiastically repeated the sentencing recommendation which he was bound by the plea agreement to make. The court found that he had not fulfilled that agreement because he had not presented his recommendation with the encouragement and advocacy required by the bargain.[72]

THE CONSTITUTIONAL BASIS FOR THE *COOPER* DECISION

Many state and lower federal courts have recognized that the most logical way to shield both the general public and the individual defendant from governmental negligence or abuse is to give constitutional protection to the reasonable expectations that the defendant develops as a result of his dealings with the government.[73] In *Cooper*, the Fourth Circuit held that in certain circumstances the mere formation of reasonable expectations in reliance upon the honor of the government in making and keeping its promises was sufficient

---

70. United States v. Bowler, 585 F.2d 851, 854 (7th Cir. 1978). *See also* Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 297 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911 (1977); Geisser v. United States, 513 F.2d 862 (5th Cir. 1975); Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973).

72. Therefore, although the prosecutor had technically fulfilled the terms of the contract by making the recommendation, the court went beyond the standards of contract law to scrutinize the prosecutor's actions more closely and found he had breached the agreement.

71. 500 F.2d 375 (4th Cir. 1974). *See also* State v. Johnson, 23 Wash. App. 490, 596 P.2d 308 (1979), where the defendant entered into a plea bargain in which he agreed to supply information about other suspects if the prosecutor would drop one of the charges against him. The defendant was not given an opportunity to see an attorney while he was in custody on several charges and refused to supply the information he had promised until he saw an attorney. The prosecutor decided that the defendant had breached his agreement to provide information and brought him to trial on the charge which was to be dropped under the plea agreement. The court upheld the agreement, stating that, "[a]lthough there may have been a technical breach by the defendant, at best it was not substantial enough to justify releasing the prosecutor from his part of the bargain at least without express notice" that the defendant must provide the information even absent counsel. *Id.* at 498–99, 596 P.2d at 312. In reaching its decision, the court relied on *Cooper*, giving it a very favorable reception.

73. *See, e.g.*, State v. Thomas, 61 N.J. 314, 320, 294 A.2d 57, 60 (1972) (essential fairness requires that the defendant's expectations be protected); Commonwealth v. Zakrzewski, 460 Pa. 528, 533, 333 A.2d 898, 900 (1975) ("It is settled that where a plea bargain has been entered into and is violated by the Commonwealth, the defendant is entitled, at the least, to the benefit of the bargain.").

Several courts have interpreted *Santobello* as implying constitutional authority for the protection of the defendant's expectation interests. State v. Thomas, 61 N.J. 314, 294 A.2d 57 (1972); Commonwealth v. Zakrzewski, 460 Pa. 528, 333 A.2d 898 (1975); State v. Tourtellotte, 88 Wash.2d 579, 564 P.2d 799 (1977). This inference may be based on the Supreme Court's conclusion that the state court must decide "whether the circumstances of this case require only that there be specific performance of the agreement on the plea

to trigger a constitutional right.[74] The court did not explain what would constitute appropriate circumstances, but it did state that the constitutional right clearly arose under the circumstances in *Cooper*.[75] Although the *Cooper* court could have avoided deciding a constitutional question by construing the Federal Rules of Criminal Procedure[76] or exercising its discretionary power over inferior federal courts,[77] it chose to base its decision on the fifth amendment due process guarantee[78] and the sixth amendment right to effective assistance of counsel.[79]

. . . or . . . the circumstances require granting the relief sought by [the defendant], *i.e.*, the opportunity to withdraw his plea of guilty." 404 U.S. at 263.

In the purely contractual setting, specific performance is ordered as relief for a broken bargain only if there is no adequate remedy in damages at law. *See* 5A A. CORBIN, CONTRACTS § 1136 (1964). Since the injury caused to the defendant's reasonable expectations cannot be adequately measured in monetary terms, only specific performance will suffice to protect the defendant's interest. *See* Stewart v. Cupp, 12 Or. App. 167, 173, 506 P.2d 503, 506–07 (1973). However, if circumstances have changed so drastically that performance of the bargain would not benefit the defendant, he may be allowed to withdraw his plea. Cooper could not have been given the option of withdrawing a guilty plea because he never entered one. *See In re* 1972 Dodge Van, 24 Ariz. App. 337, 538 P.2d 766 (1975); State *ex rel.* Gutierrez v. Baker, 276 So.2d 470, 472 (Fla. 1973); Spalding v. State, 330 N.E.2d 774, 778 (Ind. App. 1975); State v. Brockman, 277 Md. 687, 357 A.2d 376 (1976); People v. DeWolfe, 36 A.2d 618, 318 N.Y.S.2d 810 (1971); Stewart v. Cupp, 12 Or. App. 167, 173, 506 P.2d 503, 506 (1973); Commonwealth v. Zuber, 466 Pa. 453, 457–62, 353 A.2d 441, 444-46 (1976); State v. Freeman, 115 R.I. 523, 532–34, 351 A.2d 824, 829–30 (1976); State v. Tourtellotte, 88 Wash.2d 579, 564 P.2d 799, 803 (1977).

74. 594 F.2d at 18.

75. These circumstances were outlined by the court in an attempt to keep its holding as narrow as possible. The court found it crucial that:

1. the proposal was specific and unambiguous in form;
2. the proposal was made without any reservation related to a superior's approval or otherwise;
3. the proposal was reasonable in content;
4. the proposal was made by a prosecutor with apparent (and probably actual) authority;
5. the proposal was promptly communicated to the defendant;
6. the defendant assented promptly and unequivocally to the terms of the proposal;
7. the defendant indicated his assent to his counsel;
8. the defendant was entitled to assume the communication of his assent to the government would consummate the plea agreement;
9. the defense counsel promptly communicated defendant's acceptance to the government, although by chance the government's withdrawal was voiced before the defendant's acceptance;
10. the reason for the attempted withdrawal had nothing to do with extenuating circumstances affecting the government's or any public interest that was unknown when the offer was made.

Id. at 19.

76. FED. R. CRIM. P. 11 forbids unreasonable revocation of plea offers.

77. The Fourth Circuit could have imposed a standard of fairness which was not constitutionally based on the lower federal courts under its control.

78. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

79. "In all criminal proceedings, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

The Fifth Amendment Due Process Guarantee

Stating that the fifth amendment right to fundamental fairness and substantive due process is "too plain to require discussion,"[80] the court discarded an opportunity to clarify its reasoning and to provide support for its recognition of a constitutional right which protected the defendant's expectations. The court's failure to rely on prior cases recognizing constitutional protection of expectations arising in connection with plea negotiations is surprising. However, prior cases recognizing expectation interests involved situations in which the defendant had already entered a plea, revealed evidence, or completed some other act in reliance on the prosecutor's promise.[81] Therefore, the defendant's expectations had been acted upon and were arguably more deserving of constitutional protection than the expectations Cooper harbored for an afternoon but had no chance to act upon.

The Fourth Circuit commented in *Cooper* that other expectations formed by criminal defendants are constitutionally protected, yet it failed to draw any helpful analogies between those expectations and the expectations it recognized.[82] For example, the fifth amendment right to protection against double jeopardy shields the expectations of finality that defendants form as a result of trial and conviction by the state.[83] These state-created expectations merit constitutional protection to spare the defendant the substantive unfairness of uncertainty regarding his fate in the criminal justice system.[84] It is reasonable to conclude that state-created expectations of finality reasonably arising as a result of plea negotiations which are also intended to decide the defendant's fate deserve similar protection under the due process clause.[85]

---

80. 594 F.2d at 18. *See* note 29 and accompanying text *supra*.

81. *See* note 72 and accompanying text *supra*.

82. 594 F.2d at 18 n.8.

83. The defendant reasonably expects that once a trial is begun against him his fate will be decided and the trial will not be stopped and later begun again. Illinois v. Somerville, 410 U.S. 458, 471 (1973). He also expects that the sentence will not later be increased. United States v. Turner, 518 F.2d 14, 15 (7th Cir. 1975).

84. Green v. United States, 355 U.S. 184, 187 (1957) ("The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . .").

85. However, the fact that the trial judge is not bound to accept the plea bargain renders the bargain less "final" than a trial. The judge may reject the bargain and order a different resolution of the charge against the defendant. *See also* United States v. Hallam, 472 F.2d 168 (9th Cir. 1973), in which the Ninth Circuit protected a defendant's interest in the finality of a plea agreement. However, unlike the situation in *Cooper*, the agreement in *Hallam* had already been performed by both the defendant and the government.

Note that only *reasonable* expectations are considered deserving of constitutional protection. Cooper v. United States, 594 F.2d 12, 17 (4th Cir. 1979). *Cooper* does not define the term "reasonable," leaving the development of the constitutional right it recognized to a case-by-case analysis of individual facts and circumstances. *Id.* at 18. *See* United States v. Soc'y of Independent Gasoline Marketers, 624 F.2d 461 (4th Cir. 1979) (relying on *Cooper* to hold that defendant's expectations were reasonable when prosecutor with both actual and apparent authority repeatedly assured defendant of immunity from prosecu-

In *Virgin Islands v. Scotland*,[86] the Third Circuit rejected the *Cooper* court's application of the fifth amendment because it interfered with prosecutorial discretion.[87] The *Scotland* court agreed that constitutional standards required more than the use of contract principles when reviewing plea bargains and that the government should not necessarily have the right to withdraw from a plea agreement. Yet, it concluded that "binding the prosecutor to his original plea does interfere with his discretionary functions; *i.e.*, determining what he feels is fairest in light of the defendant's circumstances, the government's resources, and the statute involved."[88] Thus, the Third Circuit placed less weight on the abuse or appearance of abuse which could arise from accepting poor government conduct than did the Fourth Circuit.[89]

The Sixth Amendment Right to Effective Assistance of Counsel

In *Cooper*, the Fourth Circuit concluded that the government's withdrawal of its plea offer deprived the defendant of his sixth amendment right to the effective assistance of counsel.[90] The *Cooper* court reasoned that because

---

tion); United States v. McIntosh, 612 F.2d 835 (4th Cir. 1979) (relying on *Cooper* to hold that defendant's expectations were unreasonable when based on the offer of a state prosecutor with no real or apparent authority to promise immunity from federal prosecution). *See also* notes 123 to 143 and accompanying text *infra*. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964) (arguing that once the government has created rights for the individual in money, benefits, services, or contracts, these rights may not be taken away without due process).

86. 614 F.2d 360 (3d Cir. 1980). In *Scotland*, a defendant was offered a plea bargain which simply required him to plead guilty to certain counts. However, he was told that the government's position with respect to a sentencing recommendation would depend on his willingness to testify against a co-defendant. The defendant agreed to plead guilty to several counts but did not agree to testify for the government. Upon learning of the partial acceptance, the government attorney added another condition to the bargain; the government would renege unless the bargaining defendant agreed to make a sworn statement that his earlier statement to the police, implicating his co-defendant, was true. The defendant moved the district court to order specific performance of the initial plea agreement. The district court concluded the plea of guilty was never officially entered, that the defendant had no remedy even though the government had engaged in bad conduct, and that the defendant had had a trial which fairly decided the issues. The Third Circuit affirmed, rejecting the reasoning in *Cooper*. *Id.* at 361-62.

87. *Id.* at 364. The Third Circuit relied upon Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978), in which the Supreme Court held that a prosecutor who warned a defendant that he would be charged with the stiffer offense of habitual criminality if he did not plead guilty, and who did so charge that defendant, did not violate due process. 614 F.2d at 364 n.13.

88. 614 F.2d at 364.

89. *See* note 67 and accompanying text *supra*.

90. 594 F.2d 12, 18–19 (4th Cir. 1979). The Constitution itself does not state that the assistance must be effective: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The term was first used in Justice Sutherland's opinion in Powell v. Alabama, 287 U.S. 45, 71 (1932) (The defendant must be provided an attorney under circumstances which will not

prosecutors must conduct plea negotiations through defense counsel,[91] it is defense counsel who must deliver news of the plea discussions to the defendant. Any attempts by the government to withdraw an offer through defense counsel affects not only the defendant's trust in the integrity of the government but his confidence in his counsel's competency and professional responsibility as well. As a result, the effectiveness of defense counsel's assistance is jeopardized. In *Brewer v. Williams*,[92] the Supreme Court intimated that the defendant's effective representation by counsel may be harmed by the prosecutor's dishonor of a promise he made to defense counsel.[93] The District Court of New York took this reasoning one step further in *United States ex rel. Davis v. McMann*[94] and concluded that a defendant should have complete confidence in his counsel to benefit most fully from counsel's advice.[95]

---

hinder his ability to receive "effective aid in the preparation and trial of the case."). The term was explained in People v. Gonzalez, 47 N.Y.2d 606, 393 N.E.2d 987 (1979), in which the court held that effective assistance of counsel means more than just having a law school graduate go through the motions of representing a defendant; it requires the work of single-minded counsel in researching law and gathering arguments on the defendant's behalf so that he is afforded the protection an active advocate can provide. In McMann v. Richardson, 397 U.S. 759 (1970), the Supreme Court held that a defendant who contemplated pleading guilty to a felony charge had a sixth amendment right to effective assistance of counsel. An attorney was considered effective if his advice was within the range of competence demanded of attorneys in criminal cases. *Id.* at 770–71. *See also* State v. Johnson, 23 Wash. App. 490, 596 P.2d 308 (1979), in which a bargain was upheld because it was not reasonable to expect a defendant who was rightfully demanding the assistance of counsel before performing his part of the bargain to know that "if he didn't unequivocally consent to talk without counsel that the deal was off . . . ." *Id.* at 312.

91. FED. R. CRIM. P. 11(e)(1). States are not affected by this requirement and may still allow prosecutors to negotiate directly with defendants.

92. 430 U.S. 387 (1977).

93. In his concurring opinion in *Brewer v. Williams*, Justice Stevens stated:

> At this stage [custodial interrogation of a defendant] — as in countless others in which the law profoundly affects the life of the individual — the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizens. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise [that interrogation would not take place in counsel's absence] to [defendant's] lawyer.

Id. at 415 (Stevens, J., concurring). The *Cooper* court cited with approval the above statement by Justice Stevens. 594 F.2d at 18.

94. 252 F. Supp. 539 (N.D.N.Y. 1966), *aff'd*, 386 F.2d 611 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1968).

95. *Id.* at 545. However, court appointment of counsel deemed competent by the court and legal community will satisfy the indigent defendant's right to effective assistance of counsel. Wallace v. McDonald, 369 F. Supp. 180 (E.D.N.Y. 1973); People v. Pope, 23 Cal.3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979). The indigent defendant has no absolute right to any particular counsel of his choice. State v. Cunningham, 23 Wash. App. 826, 598 P.2d 756 (1979), *rev'd on other grounds*, 93 Wash.2d 823, 613 P.2d 1139 (1980); State v. Scarbrough, 55 Wis.2d 181, 197 N.W.2d 790 (1972). This implies that the defendant's personal relationship with his attorney is not as important as the objective ability of that attorney to represent him. However, this policy of denying the indigent defendant his choice of a particular attorney may be an attempt by the government to provide the

Clearly, a defendant has no constitutionally protected right to have confidence in his attorney *per se*.[96] However, the Fourth Circuit in *Cooper* intimated that if the defendant's lack of confidence in his attorney becomes so extreme that he refuses to cooperate with or confide in that attorney, the effectiveness of that attorney's assistance will be diminished, perhaps to the point where it no longer meets the mandate of the sixth amendment. The court implied that this is the result when competent counsel reaches a bargain beneficial to the defendant, retains no control over the government's actions, suffers government withdrawal of the bargain, and breaks the news to the defendant who often does not personally attend the plea negotiations.[97] As a result, the court reasoned that the defendant may have difficulty distinguishing the acts of the government from the acts of defense counsel, and may conclude that his counsel is incompetent.[98]

Because it lacked solid precedent for its application of the sixth amendment, the court in *Cooper* relied on the practical ramifications of withdrawal such as the possibility of prosecutorial abuse. Although it is the prosecutor's goal to do justice rather than gain a victim,[99] in practice most prosecutors must also be concerned with winning cases, or at least disposing of them quickly. Conse-

---

defendant with due process but deny him the opportunity to obstruct justice by repeated and unfounded rejection of competent court-appointed counsel. *See* Maynard v. Meachum, 545 F.2d 273 (1st Cir. 1976) (an indigent defendant's rejection of an appointed attorney because he wished for another specific lawyer or he disagreed over trial tactics was not sufficient to constitutionally require the court to appoint alternative counsel); Ennis v. LeFevre, 424 F. Supp. 14 (E.D.N.Y. 1976), *aff'd*, 560 F.2d 1072 (2d Cir. 1977); State v. Renshaw, 276 Md. 259, 347 A.2d 219 (1975) (a trial court could properly deny a defendant's request for appointment of new counsel where the trial court's inquiry into the request revealed that the defendant was adequately represented by his present counsel).

The *Davis* court stated that a defendant was entitled to a continuance when he obtained new counsel so that confidence in that counsel could be developed. However, several courts have refused to remove appointed attorneys where the defendant has claimed he lacked confidence in his counsel. United States v. Johnson, 585 F.2d 374 (8th Cir. 1978); State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976). *See generally* Bazelon, *The Defective Assistance of Counsel*, 42 CIN. L. REV. 1 (1973).

96. *See* note 95 *supra*.

97. For example, Cooper was unable to take part in the plea negotiations because he was incarcerated at the time they took place. 594 F.2d at 15. Therefore, Cooper was forced to rely entirely on his counsel's competence and no doubt attributed the result of those negotiations to his counsel. The court noted that Cooper replaced the defense counsel who handled the unsuccessful plea negotiations. *Id.* at 19 n.9.

But see United States v. Becklean, 598 F.2d 1122 (8th Cir. 1979), in which the defendants claimed that they should be allowed to withdraw their guilty pleas because of their counsel's mistaken representation to them of the prosecutor's promise. The court held that the defendant's impression of the bargain did not play a significant part in motivating their guilty pleas and denied their motions. The court did not analyze the bargain in contractual or constitutional terms, but applied instead what resembled a harmless error doctrine.

98. The Fourth Circuit reaffirmed this conclusion in United States v. McIntosh, 612 F.2d 835 (4th Cir. 1979), interpreting *Cooper*.

99. Berger v. United States, 295 U.S. 78, 88 (1935).

quently, a prosecutor may not carefully consider the side effects his plea bargaining practices have on defendants. Even worse, the prosecutor could be acutely aware of the adverse effects his withdrawal will have on a defendant and use it to his advantage.[100] Although the defendant may not suffer a constitutional violation when he loses confidence in his attorney because of a disagreement confined to the attorney-client relationship,[101] a constitutional violation may be recognized when the defendant's lack of confidence and resulting failure to cooperate or communicate with his counsel arises from an improper act by a government official which interferes with the attorney-client relationship.[102]

In *Virgin Islands v. Scotland*,[103] the Third Circuit rejected the sixth amendment right recognized in *Cooper*. The *Scotland* court held that a defendant who loses faith in his attorney when plea negotiations take an unfavorable turn is not denied his right to the effective assistance of counsel unless he has relied to his detriment on those negotiations.[104] The court reasoned that the defendant could lose faith in his attorney not only because the government withdrew a plea proposal, but because it failed to offer a plea proposal or offered only an unfavorable one.[105]

---

100. Generally, both prosecutors and defense counsel who make unauthorized offers or renege on promises not only cause harm to the defendant, but also limit their professional effectiveness and adversely impact judicial proceedings. *See generally* ABA Standards Relating to the Prosecution Function, §§ 4.1–4.3 (App. Draft 1971).

101. *See* note 95 *supra* which discusses the defendant's confidence as a result of his direct relationship with his counsel.

102. In United States v. McIntosh, 612 F.2d 835 (4th Cir. 1979), the Fourth Circuit faced a claim of sixth amendment violation based on its decision in *Cooper*. The appellant in *McIntosh* testified his attorney had "guaranteed" to him that he would not be prosecuted in federal court if he agreed to plea bargain in the state court, although there was no evidence that a promise had been made. In addition, defense counsel neither inquired whether federal charges could arise from their client's plea in state court, nor whether the state prosecutor had the authority to bind the federal officials. Clearly, the ineffective assistance of counsel displayed in *McIntosh* emanated from the carelessness of defense counsel and not from any act by the government. It did not fall within the reasoning of *Cooper*, which discussed only ineffective assistance of counsel which resulted from an act of the government.

103. 614 F.2d 360 (3d Cir. 1980).

104. *Id.* at 363.

105. The Third Circuit reasoned that under *Cooper*, the prosecutor had made his offer without any reservation depending on a superior's approval. If the prosecutor had made the proposal conditional, the defense counsel would have had a duty to inform his client of that condition. Therefore, there would be no claim of ineffective assistance of counsel based on government withdrawal once the defendant knew of the contingency. As a result, prosecutors in the Fourth Circuit will make all of their offers conditional. If the condition alone does not satisfy *Cooper*, a court may then inquire whether the condition which the prosecutor claims is legitimate or simply an attempt to avoid the *Cooper* holding. The court in *Scotland* concluded that such an inquiry would be an invasion of prosecutorial discretion. 614 F.2d at 364–65.

The Test of Constitutional Reasonableness

In concluding its analysis, the Fourth Circuit made clear that the constitutional right it recognized in *Cooper* was temperate in scope.[106] Noting that the "defendant's constitutional entitlement here is only to that process 'reasonably due' under the circumstances,"[107] the court applied a test of constitutional reasonableness by weighing the burdens which recognition of the right would place on the government against the consequences which denial of the right would have for the defendant.[108] The court concluded that recognition of the right was reasonable on two grounds. First, simple precautions on the part of the government could readily safeguard the right without endangering any valid governmental or public interest in plea bargaining.[109] Second, failure to recognize a constitutional right would give judicial approval to plea bargaining practices open to easy abuse, or at least the appearance of abuse.[110] The court also noted that recognition of the right would protect public interest in the fair and efficient administration of justice.[111]

The *Cooper* court recognized the ramifications of plea bargaining beyond the interests of a particular defendant and prosecutor. Although plea bargaining is not unanimously approved by the courts, it is generally recognized as a reasonable way to relieve the extreme burden placed on the criminal justice system.[112] However, should there be any reason to question the seriousness and

---

106. The court specifically listed those facts on which its finding of constitutional violation was based "in order to confine [its] holding as narrowly as [it] may for decision." 594 F.2d at 19. These facts are outlined in note 74 *supra*.

107. 594 F.2d at 19 (citing Santobello v. New York, 404 U.S. 257, 262 (1971)). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

108. 594 F.2d at 19.

109. *Id.* The court concluded that the government should be more specific about the proposals made and the authority of the persons making them. It stated that consideration of such procedures as signed memoranda with incorporated reservations relating to higher approval were mandated by the systematic judicial scrutiny of plea bargaining practices under FED. R. CRIM. P. 11(e).

See also United States v. Fischetti, 475 F. Supp. 1145 (D. N.J. 1979), in which the District Court of New Jersey noted that a controversy about a plea agreement would not have arisen had an experimental written plea agreement form been used:

> The use of the written forms will be required for the very reasons pointed out by the *Cooper* court, . . . where it emphasized the importance of employing routine requirements of signed memoranda as a simple and obvious tool to provide certainty and avoid controversy. Important transactions such as property contracts, deeds, mortgages and wills have long been required to be put in writing. Agreements in respect to pleas affecting a person's constitutional rights and liberty are hardly of lesser importance.

Id. at 1151.

110. 594 F.2d at 20.

111. *Id.*

112. *See* Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771, 772–74 (1973). *See also* Santobello v. New York, 404 U.S. 257, 260 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal

reliability of state-negotiated pleas, defendants will be wary of entering negotiations and judges will be disinclined to sanction the process.[113]

REMEDY

In *Cooper*, the Fourth Circuit summarily concluded that "specific enforcement of the plea proposal, to the extent . . . now possible" was necessary to correct the constitutional error it recognized.[114] Because the circumstances had changed since the district court declined to enforce the proposal, the court determined that only approximate enforcement[115] of the specific plea entered

---

charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

113. *See* Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471, 512 (1978).

114. 594 F.2d at 20. The court also stated that:

> The *status quo ante* can obviously not now be reconstructed to permit the district court objectively to consider under Fed. R. Crim. P. 11(e) whether on the facts then subsisting the proposed plea agreement should be accepted. That it could have done so in the first instance and in the process rejected the proposal does not now inhibit us in directing enforcement on remand.

Id. (citations omitted).

When molding a constitutional remedy, a court cannot create whatever relief it wishes; it must instead see that the remedy provided does not surpass what is required to protect the specific constitutional right at issue. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). However, it can be argued that constitutional remedies such as the exclusionary rule are broader than is necessary to safeguard the defendant's constitutional rights in an effort to restrain improper governmental action.

Where the right at issue is the defendant's interest in protecting his reasonably formed expectations, specific performance or its equivalent is a sufficient remedy, as it results in the enforcement of those expectations. For example, in State v. Tourtellotte, 88 Wash.2d 579, 564 P.2d 799 (1977), the lower court granted the defendant recission as a remedy for a broken plea agreement because it restored him to the position he was in before entering his plea. The defendant appealed, arguing that recission was inadequate because it denied him the benefit of the state's promise. The Washington Supreme Court granted the defendant specific performance because it was the only remedy which protected the expectations the defendant formed on the basis of the state's promise. 88 Wash.2d at 585, 564 P.2d at 803. In United States v. Runck, 601 F.2d 968 (8th Cir. 1979), the defendant entered a plea agreement in which he was subject to a certain number of years imprisonment and a limited fine. However, the lower court judge imposed a sentence which included placing Runck on probation, a condition of the probation being that Runck make restitution for the money he fraudulently received. The restitution involved a large sum of money. The Eighth Circuit held that a plea bargain limits the discretion of a sentencing judge because the expectations of the parties to the bargain should not be materially altered. *Id.* at 970. As a result of the addition of restitution, the sentence imposed was not in conformity with the negotiated plea agreements or with the defendant's expectations. *See also* note 72 *supra*.

115. In Correale v. United States, 479 F.2d 944, 950 (1st Cir. 1973), where the facts were such that specific performance was no longer feasible, the court "approximated" the relief the defendant would have received if the state had kept its promise, even though it put the defendant in a more favorable position than he would have been in if the promise had originally been kept. *But see* Westen & Westin, *A Constitutional Law of Remedies For*

could be achieved.[116] Arguably, specific performance requiring the government to present its sentencing recommendations as originally proposed would have best protected Cooper's legitimate expectations regarding what he was due in the original negotiations.[117] Under this analysis, it should not matter that Cooper was unable to perform his part of the bargain in full because his inability to do so, due to changed circumstances, was a direct result of the government's breach of negotiations and no fault of his own.

Instead of requiring specific performance, the court chose to safeguard its unprecedented recognition of a constitutional right in conservative fashion. Rejecting the taking of punitive steps against the government,[118] the court sought only to give the defendant what remained of his bargain. Clearly, enforcing what was left of the bargain did not fully satisfy Cooper's original expectations. Perhaps the moderate scope of the remedy granted was an attempt by the court to mitigate the dramatic effect recognition of the right could have on the criminal justice system, as well as to illustrate the reasonableness of its conclusion.

In *Virgin Islands v. Scotland,*[119] the Third Circuit rejected the *Cooper* court's choice of remedy.[120] The court argued that instead of granting specific performance, the defendant should be allowed to withdraw his tendered plea and refuse to accept any new bargain proposed by the prosecutor. He would then

---

Broken Plea Bargains, 66 CALIF. L. REV. 471, 516 n.159 (1978) ("[T]he state cannot insist on the remedy of specific enforcement if its promise can no longer be fully enforced. Thus, if the defendant can show that specific enforcement is no longer feasible and that he can no longer be given the full benefit of the state's promise, then he may be entitled to rescind his guilty plea." (citation omitted)).

Cooper was given the option of entering a plea of guilty to one of the three counts on which he was convicted in exchange for the government's dismissal of the remaining two counts. The court disregarded the other obligations of the proposal to which the defendant may have been held and released the government from any reciprocal obligation respecting sentencing recommendations. It assumed that Cooper would plead guilty on remand, but noted that it could only offer him that option, it could not require the plea. Should Cooper decide not to plead guilty, the judgment of the lower court would be reinstated. 594 F.2d at 20–21. Recall that the *Cooper* case was remanded on the plea bargain issue alone. *See* notes 12 & 13 and accompanying text *supra.* Yet, the court stated that had it found prejudice in either of the two errors in the conduct of his trial that Cooper assigned on appeal, his options on remand would have been greatly expanded. 594 F.2d at 14 n.1.

116. 594 F.2d at 20–21.

117. To avoid prejudice, further proceedings, including any sentencing recommendations, were to be conducted before a district judge who had not participated in the prior proceeding. *Id.* at 21. Had the remedy been provided on the basis of contract law, the government would have had to put Cooper in the position he would have been in had it performed in full. Therefore, the government may have been required to give Cooper the benefit of its sentencing recommendation to an unbiased judge.

118. The court took no punitive steps against the government beyond the approximate specific performance, implying that it was influenced by the fact that the government had not intentionally harassed the defendant. *Id.* at 20–21.

119. 614 F.2d 360 (3d Cir. 1980).

120. *Id.* at 365.

be entitled to exercise his constitutional right to trial by jury. Reasoning that the right to a jury trial is considered a sufficient remedy for the defendant who has not been offered a plea, the court held that there is no rational basis for concluding that the right is insufficient for a defendant who has been offered a plea, but has not relied upon it to his detriment.[121] However, the court relied on *Santobello* to conclude that once the defendant shows detrimental reliance, due process guarantees are implicated and the government is estopped from reneging on its promise.

The *Scotland* court reverted to the use of contractual reliance to define a defendant's constitutional rights, even though earlier in its opinion it stated that "constitutional standards require more than contract principles."[122] It was not persuaded by the narrowness of the Fourth Circuit's holding or the reasonableness of Cooper's expectations. Therefore, faced with the facts in *Cooper*, the Third Circuit would have concluded that the defendant had shown no detrimental reliance. The court did not recognize that a defendant could form a reasonable expectation on the basis of government negotiations that he would not be brought to trial because bringing the defendant to trial clearly would not remedy the loss of those expections.

REFINING *Cooper*: FOURTH CIRCUIT INTERPRETATIONS

Since its decision in *Cooper*, the Fourth Circuit on two occasions was given the opportunity to explain and refine the reasoning on which the decision was based. In *United States v. McIntosh*,[123] the defendant claimed that his federal tax evasion prosecution was barred because a *state* prosecutor had promised that no *federal* charges would be brought following his plea of guilty to gambling charges in *state* court.[124] Relying on the findings of the district court, the court held that the promise had not been made.[125] But more importantly, the court held that even if the promise had been made, it was unenforceable because the state prosecutor had no authority from federal officers to offer the promise.[126]

In reaching its decision in *McIntosh*, the Fourth Circuit found that *Cooper* was clearly distinguishable. According to the court, *Cooper* stood for the proposition that the technical rules of contract could not operate to defeat the reasonable acceptance by a defendant of an offer made by a government officer with actual or apparent authority. However, "*Cooper* does not shun fundamental contract and agency principles where [as in *McIntosh*] the content and validity of a plea bargain is at issue."[127] Applying the traditional concepts of contract

---

121. *Id.* The court reasoned that a prosecutor is under no duty to plea bargain — he can simply let a case go to trial.

122. *Id.* at 364.

123. 612 F.2d 835 (4th Cir. 1979).

124. *Id.* at 836.

125. *Id.*

126. *Id.* at 837.

127. *Id.*

and agency, the court concluded that "a bare representation by an unauthorized party cannot bind federal prosecutors to forego prosecution."[128]

IN *United States v. Society of Independent Gasoline Marketers of America*,[129] Robert R. Cavin and others were convicted of violating section one of the Sherman Act[130] by engaging in a conspiracy to set prices for the retail sale of gasoline.[131] As part of its initial investigation, the government subpoenaed Cavin and Richard Reynolds, a fellow employee, to testify before the grand jury. Before they were to testify, the federal prosecutor on several occasions assured the witness' attorneys that Cavin and Reynolds were to be given immunity.[132] With these assurances, Cavin and Reynolds met in order to refresh each other's recollection and supplement their respective knowledge with regard to incriminating evidence.[133] When the two men arrived at the grand jury hearing, Reynolds was formally granted immunity as promised, but a defense attorney was informed that Cavin would not be granted immunity at the same time because of what was claimed to be a scheduling problem.[134] Reynolds then proceeded to give his testimony which implicated Cavin in the conspiracy. Cavin, who was never formally granted immunity, was indicted and convicted.[135]

The Fourth Circuit reversed Cavin's conviction, holding that the government's conduct violated the court's decision in *Cooper*.[136] Although the court did not explicitly state that its decision was based on the Constitution, it seemed to suggest that in a situation such as this, where it is undisputed that the offers of immunity were made and the defendant acted reasonably in relying on these offers, the sixth amendment required that the promise be enforced in order to maintain the defendant's confidence in his attorney's effectiveness and capabilities.[137] Significantly, the court dismissed the district court's decision that Cavin's reliance was unreasonable because defense counsel should have

---

128. *Id.* (citing United States v. Long, 511 F.2d 878 (7th Cir.), *cert. denied*, 423 U.S. 895 (1975)).

129. 624 F.2d 461 (4th Cir. 1979).

130. 15 U.S.C. § 1 (1976).

131. 624 F.2d at 463.

132. These assurances were given to each of the three successive attorneys who were retained by Cavin and Reynolds. *Id.* at 469–71. In addition, the prosecutor showed one of the attorneys a document which indicated an authorization of immunity for both Cavin and Reynolds. *Id.* at 471.

133. *Id.* at 470.

134. *Id.* at 471.

135. Cavin originally filed a motion to dismiss the indictment, but the district court denied the motion. The Fourth Circuit dismissed Cavin's appeal, holding that the denial of the motion was not a final judgment under 28 U.S.C. § 1291 (1976). United States v. Cavin, 553 F.2d 871 (4th Cir. 1977).

136. 624 F.2d at 472. The court also relied on its decision in United States v. Carter, 454 F.2d 426 (4th Cir. 1972), where the court enforced a plea bargain in which the federal prosecutor promised the defendant that he would not be prosecuted elsewhere with regard to certain stolen checks.

137. 624 F.2d at 472 (quoting Cooper v. United States, 594 F.2d 12 (4th Cir. 1979)).

been aware of the many changing variables involved in grants of immunity. According to the Fourth Circuit, "[t]he question is whether Cavin, *as a layman,* acted reasonably in relying upon [the prosecutor's] assurances of immunity, and our appraisal of such reliance should not be made on the basis of any fine-fingered legal analysis."[138] Without elaborating, the court intimated that Cavin's reliance consisted of his conversations with Reynolds in which incriminating evidence was revealed, as well as the fact that both men retained the same attorney on the assumption that the grants of immunity would negate any conflict of interest.[139]

Thus, in both *McIntosh* and *Society of Independent Gasoline Marketers,* the Fourth Circuit was provided with an opportunity to define the constitutional and practical limits of its decision in *Cooper.* Instead, in both cases the court left unresolved the scope of these limitations. In *McIntosh,* the court found *Cooper* inapplicable, holding that the traditional rules of contract and agency must apply when the content of the plea bargain and the authority for its offer are at issue.[140] In that situation, the validity of the offer cannot rest on the subjective belief of the defendant or his counsel. Arguably, this conclusion is correct in light of the holding in *Cooper* that the defendant's reliance and expectations must be reasonable in order to enforce the plea bargain.[141] In *Society of Independent Gasoline Marketers,* although the court relied on *Cooper* to support its decision, the court easily could have based its decision on contract analogies alone. Not only was the proposal specific and unambiguous in form, and made by a prosecutor with actual authority, as in *Cooper,*[142] but the defendant had relied on the offer to his detriment by revealing incriminating evidence to a grand jury witness.[143]

138. 624 F.2d at 473 (emphasis added).

139. In reversing Cavin's conviction, however, the court remanded the case to the district court for a new trial because the applicable immunity statute only presecribes *use* immunity, not *transactional* immunity. If the government decided to proceed with a new trial, it could not use any of the evidence directly or indirectly resulting from its assurances of immunity to Cavin and Reynolds. 624 F.2d at 473–74.

140. United States v. McIntosh, 612 F.2d 835, 837 (4th Cir. 1979).

141. In *McIntosh,* the offer by the state prosecutor consisted of a promise to call his brother-in-law who was a local agent for the Internal Revenue Service. *Id.* at 836.

142. Cooper v. United States, 594 F.2d 12, 19 (4th Cir. 1979).

143. United States v. Soc'y of Independent Gasoline Marketers, 624 F.2d 461, 472–73 (4th Cir. 1979).

It is also interesting to compare the Fourth Circuit's discussions of precisely whose expectations are to be considered when deciding whether to enforce a broken plea bargain. *McIntosh* indicates that the reasonableness of the defendant's expectations depends upon either the reasonableness of his attorney's belief that the promise is valid or that the defendant was expected to know himself that a state prosecutor had no authority to make a promise binding on federal officials. However, because the court in *Soc'y of Independent Gasoline Marketers* clearly stated that the reasonableness of the attorney's belief does not enter into the calculation of the reasonableness of the defendant's expectations, *see* text accompanying note 138 *supra,* future defendants conceivably could be held to have a knowledge of the legal system which they do not in fact possess. Further, if the emphasis is placed on the defendant's expectations alone, it is difficult to understand how the defendant's faith in his attorney is compromised when those expectations are not realized.

CONCLUSION

The major weakness of the *Cooper* decision is its failure to analyze and support the conclusions it reaches. The application of fifth amendment protection to the defendant's expectations has been evident in a long line of plea bargaining cases and is rightly recognized by the court in *Cooper*. However, the court's failure to explain adequately its application of the due process right and its broad reading of *Santobello* may render its decision of little persuasive effect. In addition, other courts may conclude that *Cooper* draws too fine a line in construing the sixth amendment right to effective assistance of counsel as broad enough to encompass a defendant's belief in his counsel's incompetence arising from an act of the government absent some showing of actual counsel incompetence.

Nevertheless, several courts have adopted *Cooper* despite these weaknesses.[144] This may signal a gradual and reasonable recognition of the statement by the Supreme Court in *Santobello* that the defendant must be treated with fairness throughout the plea bargaining process.[145] The making of an offer by the government, and the formation of reasonable expectations on the basis of that offer, are integral parts of this bargaining process and merit constitutional protection not only to protect the rights of the defendant, but to preserve the public's faith in the system of justice itself.[146] Although the court in *Cooper* expressly left open the limits of its decision,[147] as the Fourth Circuit refines and supports its basically sound reasoning in subsequent cases,[148] more courts may be persuaded to go beyond the use of contract analogies where the interests of justice require.

---

144. *See, e.g.*, Turner v. Fair, 476 F. Supp. 874 (D. Mass. 1979); United States v. Fischetti, 475 F. Supp. 1145 (D. N.J. 1979).

145. Santobello v. New York, 404 U.S. 257, 261–62 (1971).

146. "There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government." Cooper v. United States, 594 F.2d 12, 20 (4th Cir. 1979) (quoting United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (Winter, J.)).

147. Cooper v. United States, 594 F.2d 12, 18 (4th Cir. 1979).

148. *See* United States v. Soc'y of Independent Gasoline Marketers, 624 F.2d 461 (4th Cir. 1979); United States v. McIntosh, 612 F.2d 835 (4th Cir. 1979). *Cf.* text accompanying notes 123 to 143 (distinguishing *Cooper*).